CHONG CHEE YAN

v.

GERMILA SDN BHD & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN ABU BACKER JC
[SUIT NO: KG 65-1993-II]
19 MARCH 2008

CONTRACT: *Letter of undertaking - Breach - Plaintiff's claim against defendant - Plaintiff adjudged a bankrupt - Whether proper to proceed with matter - Whether sanction of Director General of Insolvency required - Whether no consent obtained from Director General of Insolvency - Whether plaintiff provided consideration for letter of undertaking/guarantee - Whether defendants' defence had merits*

BANKRUPCTY: *Guarantee - Claim for - Plaintiff's claim against defendant - Plaintiff adjudged a bankrupt - Whether proper to proceed with matter - Whether sanction of Director General of Insolvency required - Whether no consent obtained from Director General of Insolvency - Whether plaintiff provided consideration for letter of undertaking/guarantee - Whether defendants' defence had merits*

The plaintiff was claiming against the defendants pursuant to a letter of undertaking dated 6 July 1988 and guarantee dated 12 July 1988. It was the plaintiff's case that the first defendant wrote him a letter undertaking to pay RM3 million by six installments in consideration of past services and future co-operation. The second defendant had signed a personal guarantee for this undertaking. The defendants have paid the plaintiff RM1 million but they failed to pay the balance of RM2 million. However, as the matter proceeded for continuation of the hearing of the trial, certain turn of events had taken place. The defendants discovered that the plaintiff had been adjudged a bankrupt as early as March 2005 and the defendants had written a letter stating in crux it was not proper to proceed with the matter any longer without the sanction of the Director-General of Insolvency.

Held (dismissing plaintiff's claim):

(1) The plaintiff had not proceeded to obtain the consent notwithstanding that he was made a bankrupt as early as 2005. The plaintiff had wasted much of the court's time in proceeding with this matter when the law required him to be

vigilant and always ensure that he had *locus* to proceed even though the court had discretion and power to hear the matter without the consent of the Director General of Insolvency. As at the commencement date of hearing and till date no consent was obtained from the Director General of Insolvency. (paras 5)

(2) Further, there were no business dealings between the plaintiff and the defendants in the plaintiff's personal capacity. The business dealings were between the plaintiff's company and the defendants. In consequence the plaintiff did not provide any consideration for the letter of undertaking and/or guarantee. The defendants' defence had merits. (paras 6)

Legislation referred to:
Bankruptcy Act 1967, s. 38

For the plaintiff - James Lo; M/s George Lo & Partners
For the defendants - Dato' Muhammad Shafee Abdullah; M/s Shafee & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the plaintiff's claim against the defendants pursuant to a letter of undertaking dated 6 July 1988 and a guarantee dated 12 July 1988.

Brief Facts

[2] It is the plaintiff's case that the 1st defendant wrote him a letter on 6 July 1988 undertaking to pay RM3 million by six installments in consideration of past services and future co-operation. The 2nd defendant signed a personal guarantee for this undertaking. The defendants have paid the plaintiff RM1 million but they failed to pay the balance of RM2 million. These are the basic facts.

The letter of undertaking reads as follows:

GERMILA SDN. BHD.

[STAMPED]

6th July, 1988 PERSONAL & CONFIDENTIAL

Mr. Chong Chee Yan
Bintulu Forest Industries Sdn Bhd
Jalan Pedada
Bintulu

Dear Sir

Letter of undertaking from GERMILA SDN BHD to MR CHONG CHEE YAN

In consideration of the goodwill and understanding existing between Germila Sdn Bhd and Bintulu Forest Industries Sdn Bhd relating to the Sarawak Pulp Industries Licence Area T/0133, Germila would similarly, in recognition of past services and in anticipating of continued future satisfactory services, like to extend their goodwill to you personally and in a tangible manner.

Germila hereby undertakes to pay you M$2/= (Two Malaysian Ringgit Only) per hoppus ton of timber extracted from the area covered by coupes 15 to 25 plus M$1/= (One Malaysian Ringgit) per hoppus ton for the overall contract awarded to other contractors to work this area.

The total consideration is therefore M$3/= (Three Malaysian Ringgit) per hoppus ton.

This will be paid on a total assumed production of one million hoppus tons and your entitlement will therefore be 3 million ringgit in total as a one-off settlement.

The payment will be made in 6 instalments of M$500,000.00 each at 6 monthly intervals, the first of which will be made in 6 months from the date of this letter.

Please signify your understanding of the above undertaking by signing the duplicate copy.

Yours faithfully
f. GERMILA SDN BHD

I, Chong Chee Yan, do acknowledge and accept the undertaking as set out in this letter dated 6th July, 1988

A

Sgd. Sgd
... ...
TING PEK KHIING CHONG CHEE YAN

Chairman & Managing
Director

B

Witnesses be Tuan Haji Annuar ... Sgd. ...

Lot 14 1407, Section 66, Jalan Belian, Bintawa Indutrial Estate,
Kuching, Sarawak.
C Tel: 483379/483380/33104
A MEMBER OF EQUATORIAL HOLDING GROUP

The letter of guarantee reads as follows:

D **Personal and Confidential** [STAMPED]

12 July 1988

Mr. Chong Chee Yan
Bintulu Forest Industries Sdn Bhd
Jalan Pedada
E Bintulu

Dear Sir

Letter of undertaking from Germila Sdn Bhd to Mr. Chong Chee Yan

F

With reference to the letter of undertaking to you from Germila Sdn Bhd dated 6 July 1988, I, Ting Pek Khiing, IC No K 145076 being Chairman and Managing Director of Germila Sdn Bhd do hereby extend my personal guarantee jointly and severally toward the performance and fulfillment of the aforementioned letter
G of guarantee to you in the sum of 3 million ringgit.

I also extend a similar guarantee towards Bintulu Forest Industries Sdn Bhd as per Germila Sdn Bhd letter to BFI dated 6 July 1988 in the sum 2 million ringgit.

H

Sgd.
...
TING PEK KHIING

Witnessed
I Sgd.
...
TUAN HJ ANUAR RAZAK

[3] Defendants have not filed their submissions. However the leading counsel for the defendants, Dato' Muhammad Shafee Abdullah at the early part of the proceedings has set out the line of the defence. This is found in the notes of proceedings before the previous judge and reads as follows:

Dato' Muhammad Shafee Abdullah:

> The defence as its stands takes various defences either in cumulative form or in alternative form. If YA look at paragraph 3 of the Defence, YA will see that are at least 2 defences there. One is that the letter of undertaking is unstamped therefore, it would not be admissible in court and no claim can be maintained arising from that. Now the second defence in the same paragraph, talks of void-ness of the undertaking for total want of consideration. YA, I agree that there are no particulars to indicate what is the lack of consideration. But Plaintiff themselves have not sought for particulars. This is not the only time the total want of consideration has been indicated. The other is in paragraph 7. The other defence, amongst others, is at paragraph 9 which is an alternative defence to all the other defences which is clear from the words "The Defendants will also maintain". YA will have heard Mr. Chong Chee Yan, PW2, in crystal clear terms when he said the undertaking of RM3 million by Germila to Mr. Chong himself and to Bintulu Forest Industries arose only because of the subsistence of the 1986 Agreement at the time of the meeting with Tan Sri Ting. As we have endeavoured to show this Court if the 1986 Agreement did not exist there is a total want of consideration. That is what the pleadings say at paragraph 3 and repeated at paragraph 7. It comes within the pleadings of what we have raised with Mr. Chong this morning. There is also no element of surprise because the same issue has been highly ventilated in the Kuala Lumpur Petition. In fact in the Kuala Lumpur Petition, the claim of the existence of the 1986 Agreement was brought about by Mr Chong Chee Yan and his company, Kemarakan as joint petitioners. Therefore our cross-examination this morning is within the pleading and if required we could provide the particulars which I do not think is necessary in view of the knowledge of the Plaintiff. We could provide the particulars at any time and it does not prejudice the Plaintiff's case at all. In fact if I may say, no doubt we couched it as a total want of consideration and

A it is also if YA believe the fact, that we have endeavoured to show this want of consideration borders on criminality because it is a total misrepresentation to the Defendant who acting on that misrepresentation issued the 2 Letters of Undertaking. It would be against public policy to deny such a defence because the Plaintiff would be maintaining their case mounted on a dishonest claim. Paragraph 11 of the Defence is also relevant to that effect. That is all.

Preliminaries

[4] This matter was part-heard before the previous judge as early as 15 July 2003. Thereafter with the consent of the parties on 22 August 2007 the matter proceeded for the continuation of the hearing of the trial before me from 4 September 2007. The defence closed their case on 8 January 2008. I gave directions for submissions. There was delay in the plaintiff's submission. In consequence the defendants did not file the submission. Thereafter certain turn of events took place. They are as follows:

(i) the defendants discovered that the plaintiff has been adjudged a bankrupt as early as March 2005.

(ii) the defendants wrote a letter dated 5 March 2008 stating in crux it is not proper to proceed with the matter any longer without the sanction of the Director-General of Insolvency. The said letter reads as follows:

Ee & Lim
Advocates & Notary Public

No. 4, PETANAK ROAD, 93100
P.O. BOX 93, 93700 KUCHING

Your Ref:

Our Ref: LCE/ah/524/98/A March 5, 2008

The Secretary
To His Lordship
Yang Arif Dr. Haji Hamid Sultan Bin Abu Backer
High Court II
Kuching

By Fax & Hand

Dear Madam

Re: Kuching High Court Civil No KG 65 of 1993/II
Chong Chee Yan vs 1. Germila Sdn Bhd
2. Datuk Ting Pek Khiing

We act for the Defendants in the above action.

Due to the delay in the delivering of the Plaintiff's submission we had by our letter of February 20, 2008 to Messrs George Lo & Partners informed them that we would only be able to serve on them our clients' submission only by 20th March 2008. A copy of our said letter was also furnished to you.

It has however now come to the knowledge of our clients that Chong Chee Yan the Plaintiff herein had been adjudicated a bankrupt in March 2005 as evidenced by a copy of the Carian Rasmi dated 27.02.2008 enclosed herewith.

Being an adjudicated bankrupt the Plaintiff is under the provisions of the Bankruptcy Act incompetent to maintain the action without the sanction of the Director General of Insolvency (DGI) as his estate became vested in the DGI. Our clients the Defendants also fear that if the action continues and the Plaintiff should fail then he will be unable to pay their costs of the action.

In the circumstances we write to seek the indulgence of his Lordship to give direction as to whether or not the proceeding should continue in view of the Plaintiff's present status without the sanction of the DGI.

We await his Lordship's direction herein and in the meantime will withhold the delivery of the Defendants' submission.

We shall be grateful if you could place our letter before his Lordship for his consideration of our request for direction.

Yours faithfully

EE & LIM

(Sgd.)

LEE C E

Encl

cc Messrs Shafee & Co
Advocates & Solicitors
Chambers Twenty-Five
No. 25 Jalan Tunku Bukit Tunku
50480 Kuala Lumpur Malaysia By Fax Only

A Tan Sri Datuk Paduka Dr Ting Pek Khiing
Messrs Germila Sdn Bhd By Fax Only

Messrs George Lo & Partners
Advocates & Solicitors
B No. 48-49 1st Floor Block F
King's Centre Jalan Simpang Tiga By Fax & Post
93350 Kuching
(with Enclosure)

C (iii) the plaintiff responded to the letter and said I should proceed to hear and decide the matter. The said letter reads as follows:

No. 48-49 1st floor block f king's centre jln simpang tiga 93350 kuching sarawak

GEORGE LO & PARTNERS
advocates & solicitors

D Our ref: c/119/223/c
Date: 6 March 2008

E The Secretary to the
Honourable Judicial Commissioner By Hand
Tuan Haji Dr Hamid Sultan bin Abu Backer
High Court II, Kuching

Dear Madam

F Re: Suit No.KG.65/93/II
Chong Chee Yan v Germila Sdn Bhd & Ting Pek Khiing

We act for the plaintiff and refer to the letter from M/s Ee & Lim on behalf of the defendants dated 5 March 2008.

G We have contacted the plaintiff on the subject of the letter, namely his apparent bankruptcy. As we have already put on record, the plaintiff is suffering from senile dementia caused by acute diabetes. The plaintiff himself is unaware he was declared bankrupt. We have on even date written to the DGI in Miri
H to confirm that the plaintiff is indeed bankrupt and, if so, to apply for sanction to continue to represent him in the present Suit.

As for the defendants' request as stated in their letter dated 5
I March 2008, we respectfully opine that the current proceedings ought to continue without any further delay. The trial is concluded and we have filed our closing submission. All that remains is for the defendants to submit. We propose that our

application for sanction may run parallel to the Court's determination of the dispute. The plaintiff's apparent bankruptcy makes no difference to the need for adjudication of his claim. Any consequence would only arise if judgment is given in the plaintiff's favour. Obviously any judgment sum recovered would be paid to the DGI for distribution to approved creditors, and the balance only released to the plaintiff upon discharge of his bankruptcy. We therefore urge Yang Arif to direct the defendants to file their submission as originally scheduled. The Court has already fixed 8 April 2008 to eliver its decision and dispose of this case. There is no cogent reason why this Suit (filed in 1993) should be adjourned sine die while pending sanction from the DGI.

Please do not hesitate to contact the writer if we may be of further clarification. Please show this letter to Yang Arif as soon as possible. Thank you.

Yours faithfully

GEORGE LO & PARTNERS

Sgd.
James Lo

cc 1. M/s Ee & Lim

2. Client (by fax only)

[5] As the plaintiff himself has requested me to proceed and deliver the decision, I take the view on the facts of this case that interest of justice will be better served if I decide the issues relating to this case and give my judgment notwithstanding the Director-General of Insolvency has not given consent for the plaintiff to proceed with the proceedings. I have such discretion and powers and I have dealt with this area of law in a number of my cases and it is not necessary for me to repeat the same. My reasons for doing so are as follows:

(i) the plaintiff is of advanced aged and according to the plaintiff's counsel he is suffering from senile dementia and from acute diabetes.

(ii) it will not serve useful purpose to prolong this matter, as the suit was filed as early as 1993.

A **Plaintiff's Incompetency To Continue Proceedings**

[6] When the trial commenced before me on 4 September 2007 the plaintiff's counsel as a general rule had no *locus standi* to proceed as the plaintiff had been made a bankrupt as early as
B 2005. The plaintiff says I should proceed to give judgment and thereafter they will continue to obtain the consent of Director-General of Insolvency. I think the plaintiff's argument is flawed. Section 38 of Bankruptcy Act 1967 does not support the plaintiff's argument. On the facts of this case, taking all the
C circumstances into consideration, the only order which I should make is to dismiss the plaintiff's claim with no order as to costs on the grounds that:

(i) the plaintiff had not proceeded to obtain the consent notwithstanding that he was made a bankrupt as early as
D 2005. The plaintiff has wasted much of the court's time in proceeding with this matter when the law requires him to be vigilant and always ensure that he has locus to proceed even though the court has discretion and power to hear the matter without the consent of the Director General of Insolvency.
E

(ii) as at the commencement date of hearing before me and till date no consent was obtained from the Director-General of Insolvency.

F (iii) even if I were to have proceeded to give judgment on the evidence, I will not find the case in favour of the plaintiff for the following reasons:

(a) it is my finding that there was no business dealing between
G the plaintiff and the defendants in the plaintiff's personal capacity.

(b) it is my finding that the business dealings were between the plaintiff's company and the defendants. In consequence the plaintiff did not provide any consideration for the letter
H of undertaking and/or guarantee.

(c) the defendants' defence had merits.

[7] For reasons stated above, I dismiss the plaintiff's claim with
I no order as to costs. I hereby order so.